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BEFORE THE ARIZONA CORPORATION COMMISSION

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2004 DEC -8 P 3: 52

COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission

DOCKETED

DEC - 8 2004

DOCKETED BY

CM

VICTOR MONROE STOCKBRIDGE
[CRD # 1233627], and
G. IRENE STOCKBRIDGE
[Husband and Wife]

61 Rufous Lane
Sedona, Arizona 86336-7117

Respondents.

DOCKET NO. S-03465A-02-0000

SECURITIES DIVISION'S MOTION FOR
PROTECTIVE ORDER

I. INTRODUCTION.

Respondents filed three proposed subpoenas with the Executive Secretary of the Arizona Corporation Commission ("Commission"), for depositions of two Securities Division ("Division") employees and a third party witness. Despite knowing that they needed to move the Administrative Law Judge to authorize such discovery after they had first shown reasonable need for the discovery, Respondents acted unilaterally in attempting to avoid the requirements of the statute. After two of the subpoenas were executed, Respondents served them on December 7, 2004. Since Respondents have no right to conduct the depositions, the Division requests the Administrative Law Judge issue a protective order and bar the requested depositions.

II. RESPONDENTS HAVE NOT MET THE REQUIREMENTS
TO CONDUCT DISCOVERY.

A party may pursue discovery during the course of an administrative proceeding only to the extent that it is explicitly authorized in a specific statute or rule. *See, e.g., 73A C.J.S. Public Administrative Law and Procedure*, § 124 (1983) (“Insofar as the proceedings of a state administrative body are concerned, only the methods of discovery set forth by the pertinent statute are available, and the methods not set forth therein are excluded”); *see also* 2 Am.Jur.2d. *Administrative Law* § 327 (2d. ed. 1994) (In the context of administrative law, any right to discovery is grounded in the procedural rules of the particular administrative agency). Indeed, both the Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Corporation Commission (“Rules of Practice and Procedure”) contain explicit provisions addressing discovery procedures in contested administrative adjudications.

The limits of discovery in an administrative proceeding are in large part governed by the Arizona Administrative Procedures Act, A.R.S. § 41-1001, *et seq.* Under Article 6 of this Act, covering “Adjudicative Proceedings,” Arizona law provides as follows:

A.R.S. § 41-1062: Hearings; evidence; official notice; power to require testimony and records; Rehearing

A. Unless otherwise provided by law, in contested cases the following shall apply:

* * *

4. The officer presiding at the hearing may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths. . . . **Pre-hearing depositions and subpoenas for the production of documents may be ordered by the officer presiding at the hearing, provided that the party seeking such discovery demonstrates that the party has reasonable need of the deposition testimony or materials being sought....** Notwithstanding the provisions of section 12-2212, no subpoenas, depositions or other discovery shall be permitted in

contested cases except as provided by agency rule or this paragraph.

(Emphasis added). The plain import of this provision is that a party must:

1. Request the presiding officer to allow a deposition or production of materials, and
2. In the request, show a reasonable need for the discovery.

If the presiding officer finds that a party has met both those steps, he may authorize the discovery. At that point, a subpoena may be issued.

The reasons for these limits are plain. Administrative discovery is limited by the Administrative Procedures Act, unless a specific agency has a unique situation that the agency may address by rule. In a regulatory action, the issue is whether the respondent has violated the law. The respondent is obviously fully informed about his or her own conduct. The agency will conduct its investigation and then give the respondent at a hearing the opportunity to refute or present additional information about the respondent's conduct and its compliance with the relevant law. The person in the best position to determine if a situation exists that does call for some type of discovery is the officer hearing the matter—the law, as Respondents contend, could not have intended to end run that person.

In the present case, Respondents disregarded these discovery requirements by instead unilaterally requesting the Executive Secretary of the Commission issue subpoenas.¹ Despite the explicit requirements of A.R.S. § 41-1062, Respondents utterly ignored their obligation to request the Administrative Law Judge allow them to conduct discovery and certainly made no showing of reasonable need for the depositions as required by the statute. What makes this action even more egregious is that Respondents' counsel was recently involved in other litigation before the Commission in which he tried to sidestep around A.R.S. § 41-1062 and failed. *See In re Yucatan Resorts, et al.*, S-03539A-03-0000. Additionally, in a prior telephone conversation counsel for the

¹ Copies of the subpoenas are attached to this motion.

1 Division informed Respondents' counsel that in order to conduct depositions he would need to go
2 before the Administrative Law Judge and show a reasonable need for the discovery. Despite this
3 knowledge, Respondents still attempted to avoid the requirements of the law by failing to inform
4 the Executive Secretary of these facts and instead just requested that the subpoenas be issued.

5 In a later communication, sent to the Division after the subpoenas were served,
6 Respondents contended that they may ignore the requirements of Section 41-1062 as A.A.R.14-3-
7 109(P)² allows them to conduct any depositions at any time that they wish to do so. However,
8 what Respondents ignore is that Rule14-3-109(P) specifically states that depositions may be taken
9 only "as prescribed by law" "The term 'as may be prescribed by law' means as provided by
10 legislative enactment." *Litchfield Elementary School Dist. No. 79 of Maricopa County v. Babbitt*,
11 125 Ariz. 215, 221, 608 P.2d 792, 798 (App. 1980). In this case, the law enacted by the legislature
12 is Section 41-1062, which prescribes the circumstances in which discovery may take place. Rule
13 14-3-109(P) is simply a general acknowledgment that depositions may be taken as part of these
14 proceedings. However, in order to conduct depositions, a party must follow the law and move the
15 presiding officer to allow them.

16 Respondents' interpretation, by contrast, would ignore the law and allow a party in an
17 administrative case an unfettered right to conduct depositions of anyone they wanted, irrespective
18 of the deponent's connection to the case, irrespective of whether the deponent was even a witness
19 and irrespective of whether the party's motive in seeking the deposition was to harass the deponent.
20 According to Respondents, nothing in law can stop them from deposing anyone as part of this
21 proceeding. That, of course, turns administrative law in a complete circle as generally no
22 discovery is allowed in an administrative proceeding. 73A C.J.S. *Public Administrative Law and*
23 *Procedure*, § 124 (1983). Respondents' interpretation would allow unlimited discovery,
24 completely at their discretion.

25 ² "Depositions. The Commission, a Commissioner, or any party to any proceeding before it may cause the
26 depositions of witnesses to be taken in the manner prescribed by law and of the civil procedure for the Superior Court
of the state of Arizona." (Emphasis added.)

1 What truly shows the lack of merit in Respondents' argument is that A.A.R.14-3-109(P)
2 contains nothing about the issuance of subpoenas. The Commission rule on subpoenas is contained
3 in A.A.R.14-3-109(O) which states that the subpoenas may be issued for the purpose of taking
4 testimony at a hearing. Plainly a deposition is not a hearing. Therefore Respondents' subpoenas
5 could not have been authorized by Rule 14-3-109(O). The only other applicable provision
6 pertaining to subpoenas is Section 41-1062, which states that the presiding officer may issue a
7 subpoena upon a party proving reasonable need. Obviously Respondents' subpoenas did not
8 follow that procedure and were not authorized by that statute. As Section 1062(A)(4) makes clear,
9 "Notwithstanding the provisions of section 12-2212, no subpoenas, depositions or other discovery
10 shall be permitted in contested cases except as provided by agency rule or this paragraph."
11 Therefore, there is nothing in either statute or rule which authorizes Respondents' subpoenas.

12 III. CONCLUSION.

13 On December 7, 2004, Respondents obtained two subpoenas without proper authority and
14 served them upon two Division employees involved in the investigation of the case, Michael
15 Donovan and Mark Klamrzynski. Therefore, the Division respectfully requests the Administrative
16 Law Judge to promptly enter a protective order, barring Respondents from conducting these
17 depositions and requiring them to follow the Section 41-1062 if they desire to conduct any
18 discovery in this proceeding.

19 Submitted this 8th day of December, 2005

20
21 ARIZONA CORPORATION COMMISSION

22
23 By 

24 Mark Dinell

25 Attorney for the Securities Division of the
26 Arizona Corporation Commission

1 ORIGINAL of the foregoing and 13 copies
2 filed with Arizona Corporation Commission
3 Docket Control this 8th day of December
4 2004.

5 Copy of the foregoing delivered this 8th day
6 of December 2004 to:

7 Marc Stern
8 Administrative Law Judge
9 Arizona Corporation Commission
10 1200 W. Washington
11 Phoenix, AZ 85007

12 COPY of the foregoing transmitted by
13 FACSIMILE and mail this 8th day of
14 December 2004 to:

15 Paul Roshka, Jr.
16 James McGuire
17 Roshka, Heyman & DeWulf
18 400 E. Van Buren, Suite 800
19 Phoenix, AZ. 85004
20 Tel. (602) 256-6100
21 Fax. (602) 256-6800
22 Attorneys for Respondents

23 
24
25
26

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS:**

3 **MARC SPITZER, Chairman**
4 **WILLIAM A. MUNDELL**
5 **JEFF HATCH-MILLER**
6 **MIKE GLEASON**
7 **KRISTIN K. MAYES**

8 In the matter of:

9 **VICTOR MONROE STOCKBRIDGE**
10 **[CRD # 1233627] and G. IRENE**
11 **STOCKBRIDGE (husband and wife)**

12 **61 Rufous Lane**
13 **Sedona, Arizona 86336-7177**

14 Respondents.

DOCKET NO. S-03465A-02-0000

RESPONDENTS' SUBPOENA TO
MICHAEL DONOVAN

15 **TO: Mr. Michael Donovan**
16 **c/o Mark Dinell, Esq.**
17 **Securities Division/Arizona Corporation Commission**
18 **1300 W. Washington Street, 3rd Floor**
19 **Phoenix, AZ 85007**

20 Pursuant to A.A.C. R14-3-109(P), you are commanded to appear and give testimony at the
21 time and place specified below:

22 **DATE AND TIME OF PERSONAL**
23 **APPEARANCE:**

December 13, 2004, at 9:00 a.m.

24 **BEFORE WHOM APPEARANCE TO BE MADE: Court Reporter**

25 **PLACE OF APPEARANCE:**

26 **Offices of Roshka Heyman & DeWulf, PLC**
27 **One Arizona Center**
28 **400 East Van Buren Street, Suite 800**
29 **Phoenix, AZ 85004**
30 **(602) 256-6100**

31 You have been subpoenaed by Respondents, whose attorney's name, address and telephone
32 number is:

33 **Paul J. Roshka, Jr. Esq.**
34 **James M. McGuire, Esq.**
35 **ROSHKA HEYMAN & DEWULF, PLC**
36 **One Arizona Center**
37 **400 East Van Buren Street, Suite 800**
38 **Phoenix, AZ 85004 (602) 256-6100**

1 In accordance with Rule 45 of the Arizona Rules of Civil Procedure, the full text of
2 subdivision (a)(1)(D) of Rule 45 is set forth below:

3 **Your Duties in Responding to This Subpoena**

4 You have the duty to produce the documents requested as they are kept by you in the usual
5 course of business, or you may organize the documents and label them to correspond with the
6 categories set forth in this subpoena. See Rule 45(d)(1) of the Arizona Rules of Civil Procedure.

7 If this subpoena asks you to produce and permit inspection and copying of designated
8 books, papers, documents, tangible things, or the inspection of premises, you need not appear to
9 produce the items unless the subpoena states that you must appear for a deposition, hearing or trial.
10 See Rule 45(c)(2)(A) of the Arizona Rules of Civil Procedure.

11 **Your Right to Object**

12 The party or attorney serving the subpoena has a duty to take reasonable steps to avoid
13 imposing an undue burden or expense on you. See Rule 45(c)(1) of the Arizona Rules of Civil
14 Procedure.

15 You may object to this subpoena if you feel that you should not be required to respond to
16 the request(s) made. Any objection to this subpoena must be made within 14 days after it is served
17 upon you, or before the time specified for compliance, by providing a written objection to the party
18 or attorney serving the subpoena. See Rule 45(c)(2)(B) of the Arizona Rules of Civil Procedure.

19 If you object because you claim the information requested is privileged or subject to
20 protection as trial preparation material, you must express the objection clearly, and support each
21 objection with a description of the nature of the document, communication or item not produced so
22 that the demanding party can contest the claim. See Rule 45(d)(2) of the Arizona Rules of Civil
23 Procedure.

24 If you object to the subpoena in writing you do not need to comply with the subpoena until
25 ordered to do so. It will be up to the party or attorney serving the subpoena to seek an to compel
26 you to provide the documents or inspection requested, after providing notice to you. See Rule
27 45(c)(2)(B) of the Arizona Rules of Civil Procedure.

You also may file a motion to quash or modify the subpoena if the subpoena:

- 21 (i) does not provide a reasonable time for compliance;
- 22 (ii) requires a non-party or officer of a party to travel to a county different from the
23 county where the person resides or does business in person; or to travel to a county different from
24 where the subpoena was served; or to travel to a place farther than 40 miles from the place of
25 service; or to travel to a place different from any other convenient place fixed by an order of a
26 court, except that a subpoena for you to appear and testify at trial can command you to travel from
27 any place within the state;
- 28 (iii) requires the disclosure of privileged or protected information and no waiver or
29 exception applies; or
- 30 (iv) subjects you to an undue burden. See Rule 45(c)(3)(A) of the Arizona Rules of
31 Civil Procedure.

1 If this subpoena:

2 (i) requires disclosure of a trade secret or other confidential research, development, or
3 commercial trade information; or

4 (ii) requires disclosure of an unretained expert's opinion or information not describing
5 specific events or occurrences in dispute and resulting from the expert's study made not at the
6 request of any party; or

7 (iii) requires a person who is not a party or an officer of a party to incur substantial
8 travel expense;

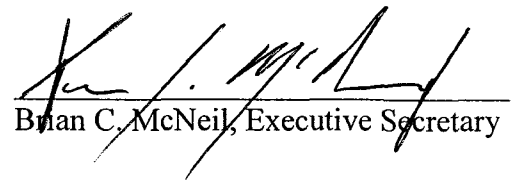
9 The Commission may either quash or modify the subpoena, or may order you to appear or
10 produce documents only upon specified conditions, if the party who served the subpoena shows a
11 substantial need for the testimony or material that cannot be otherwise met without undue hardship
12 and assures that you will be reasonably compensated. See Rule 45(c)(3)(B) of the Arizona Rules
13 of Civil Procedure.

14 A command to produce evidence or permit inspection may be joined with a command to
15 appear at trial or hearing or at deposition, or may be issued separately.

16 ***REQUESTS FOR REASONABLE ACCOMMODATIONS FOR PERSONS WITH***
17 ***DISABILITIES MUST BE MADE TO THE DIVISION ASSIGNED TO THE CASE BY THE***
18 ***PARTIES AT LEAST THREE (3) JUDICIAL DAYS IN ADVANCE OF A SCHEDULED***
19 ***COURT PROCEEDING.***

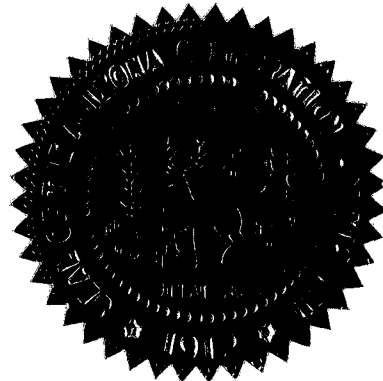
20 ***DISOBEDIANCE OF THIS SUBPOENA CONSTITUTES CONTEMPT OF THE***
21 ***ARIZONA CORPORATION COMMISSION, AND IS PUNISHABLE, PURSUANT TO A.R.S.***
22 ***§§ 40-424.***

23 Given under the hand and seal of the Arizona Corporation Commission this 7th day of
24 December, 2004.

25 
Brian C. McNeil, Executive Secretary

26 COPY of the foregoing hand-delivered
27 this 7th day of December, 2004 to:

Marc E. Stern
Hearing Officer
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007



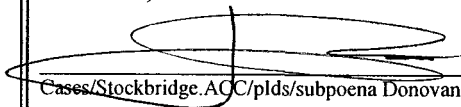
ROSHKA HEYMAN & DEWULF, PLC

ONE ARIZONA CENTER
400 EAST VAN BUREN - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
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Mark Dinell, Esq.
Securities Division
Arizona Corporation Commission
1300 West Washington Street, 3rd Floor
Phoenix, Arizona 85007

Arizona Reporting Service, Inc.
2627 North. 3rd Street
Phoenix, AZ 85004


Cases/Stockbridge.ACC/plds/subpoena Donovan.doc

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2 **COMMISSIONERS:**

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4 **WILLIAM A. MUNDELL**
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6 **MIKE GLEASON**
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13 **Sedona, Arizona 86336-7177**

14 **Respondents.**

DOCKET NO. S-03465A-02-0000

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MARK KLAMRZYNSKI

15 **TO: Mr. Mark Klamrzynski**
16 **c/o Mark Dinell, Esq.**
17 **Securities Division/Arizona Corporation Commission**
18 **1300 W. Washington Street, 3rd Floor**
19 **Phoenix, AZ 85007**

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21 time and place specified below:

22 **DATE AND TIME OF PERSONAL**
23 **APPEARANCE:**

December 13, 2004, at 2:00 p.m.

24 **BEFORE WHOM APPEARANCE TO BE MADE: Court Reporter**

25 **PLACE OF APPEARANCE:**

26 **Offices of Roshka Heyman & DeWulf, PLC**
27 **One Arizona Center**
400 East Van Buren Street, Suite 800
Phoenix, AZ 85004
(602) 256-6100

28 You have been subpoenaed by Respondents, whose attorney's name, address and telephone
29 number is:

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31 **James M. McGuire, Esq.**
32 **ROSHKA HEYMAN & DEWULF, PLC**
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19 If you object because you claim the information requested is privileged or subject to
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21 objection with a description of the nature of the document, communication or item not produced so
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- 22 (ii) requires a non-party or officer of a party to travel to a county different from the
23 county where the person resides or does business in person; or to travel to a county different from
24 where the subpoena was served; or to travel to a place farther than 40 miles from the place of
25 service; or to travel to a place different from any other convenient place fixed by an order of a
26 court, except that a subpoena for you to appear and testify at trial can command you to travel from
27 any place within the state;
- 25 (iii) requires the disclosure of privileged or protected information and no waiver or
26 exception applies; or
- 27 (iv) subjects you to an undue burden. See Rule 45(c)(3)(A) of the Arizona Rules of
Civil Procedure.

If this subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial trade information; or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial travel expense;

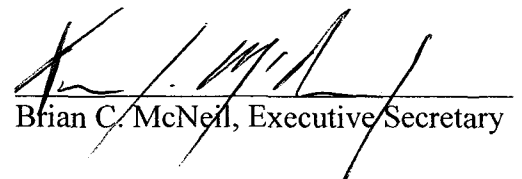
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A command to produce evidence or permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

REQUESTS FOR REASONABLE ACCOMMODATIONS FOR PERSONS WITH DISABILITIES MUST BE MADE TO THE DIVISION ASSIGNED TO THE CASE BY THE PARTIES AT LEAST THREE (3) JUDICIAL DAYS IN ADVANCE OF A SCHEDULED COURT PROCEEDING.

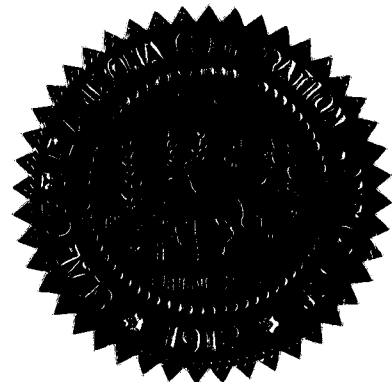
DISOBEDIANCE OF THIS SUBPOENA CONSTITUTES CONTEMPT OF THE ARIZONA CORPORATION COMMISSION, AND IS PUNISHABLE, PURSUANT TO A.R.S. §§ 40-424.

Given under the hand and seal of the Arizona Corporation Commission this 7th day of December, 2004.


Brian C. McNeil, Executive Secretary

COPY of the foregoing hand-delivered
this 7th day of December, 2004 to:

Marc E. Stern
Hearing Officer
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007



ROSHKA HEYMAN & DEWULF, PLC

ONE ARIZONA CENTER
400 EAST VAN BUREN - SUITE 800
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Mark Dinell, Esq.
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